RECORD
AND
BRIEF

Supreme Court, U.S.
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No. 15-1391

In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM, and DAVID ROSS,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; KENNETH P. THOMPSON, in his official capacity as District Attorney of Kings County,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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August 17, 2016

REPLY BRIEF FOR PETITIONERS

Since the petition in this case was filed, two other petitions presenting the same question have followed suit. *See Rowell v. Pettijohn*, No. 15-1455 (filed May 31, 2016); *Bondi v. Dana's Railroad Supply*, No. 15-1482 (filed June 6, 2016). These petitions each ask the Court to resolve a direct and acknowledged circuit split over whether state no-surcharge laws violate the First Amendment, and they have been filed from each of the three circuits that have thus far divided on the issue.

1. In denying the existence of this clear split, New York stands alone. Courts, commentators, amici, and two of New York's sister states (Florida and Texas) all agree that there is a split. As Florida put it in its petition in *Dana's Railroad* (citing the petition here): "this split is now squarely before this Court for its consideration and resolution," and it implicates "too important an issue to tolerate the circuit split." Pet. in *Dana's Railroad*, at 10, 14. Indeed, even Texas, in *opposing* certiorari in *Rowell*, conceded "the existing circuit split." BIO in *Rowell*, at 9.

It was right to do so. All the state laws at issue in these cases allow merchants to charge a higher price to customers who pay by credit card than those who pay in cash—but only if the difference is framed as a cash "discount." And the plaintiffs in each case seek the same thing: to truthfully and prominently convey the cost of credit as a "surcharge" or an "additional" fee on top of the "sticker" price (by posting a large sign saying, for example, that they charge "a 3% fee on purchases made by credit card"). In Florida, thanks to the Eleventh Circuit's decision, they have a constitutional right to truthfully communicate their prices in this way. In New York and Texas, they do not. That is a textbook example of a "circuit split," as the Fifth Circuit acknowledged. *Rowell v. Pettijohn*, 816 F.3d 73, 78 (5th Cir. 2016).

So New York is simply wrong when it says (at 8) that "these decisions do not create a direct circuit split." The "differing outcome in the Eleventh Circuit" is not due to "different understandings of the scope and operation of the particular state statute at issue in each case," BIO 8, 10; it's due to a fundamental "disagreement over where to draw the speech–conduct boundary" on a question affecting billions of dollars of transactions annually. Pet. in *Dana's Railroad*, at 16.

The Court should not delay in resolving that profoundly important constitutional disagreement based on New York's speculation that hypothetical future state-court litigation "may alter the scope of the surcharge prohibitions." BIO 11. The petitioners here wish to truthfully convey the cost of credit in a way that the Eleventh Circuit held is protected speech. The only reason they cannot do so is because the Second Circuit held the opposite. No state court can overrule that interpretation of the First Amendment. Perhaps it is possible (at least theoretically) that a state court could somehow find a way to radically narrow the scope of New York's law to allow the speech that the petitioners wish to communicate—despite the Attorney General's long-held enforcement position to the contrary, as catalogued in several uncontested merchant declarations in the record, as well as a state-court criminal prosecution. But that unlikely event would not cure the First Amendment harms (not to mention legal fees) suffered in the meantime. And it would do nothing to resolve the split and clarify the constitutionality of the half-dozen state laws, plus Puerto Rico's, that have not yet been challenged.[1]

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[1] By the same token, the Second Circuit's decision to invoke *Pullman* abstention in declining to rule on a subsidiary aspect of the petitioners' challenge does not affect the split. It does, however,

(continued ...)

Nor is there any reason for this Court to await the Ninth Circuit's eventual decision on the constitutionality of California's no-surcharge law. That decision will only widen the split—not cause it to "wane." BIO 14. And the conflict is "fully developed" enough as it is. *Id.* Seven courts have chimed in, producing nine opinions that thoroughly explore the question. The split is "as square as it will ever get." Br. for Albertsons et al. 14.

2. Aside from denying the existence of the split, New York also makes a half-hearted attempt to diminish its importance. But as the six amicus briefs supporting this petition attest, the proper resolution of the question presented is of enormous practical and doctrinal significance. It implicates "*tens of billions of dollars* every year in 'swipe fees,'" *id.* at 3, and concerns nothing less than "the threshold determination of whether a regulation governs speech or conduct," Note, *Free Speech After* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981, 1988 (2016).

To the extent that New York is suggesting (at 13) that the facts on the ground have now changed because of the Second Circuit's recent disapproval of the proposed antitrust settlement between merchants and Visa and MasterCard, that is not true. Those companies have not changed their merchant contracts to resurrect their anticompetitive and regressive no-surcharge rules, nor have they given any indication that they plan to do so. And the Second Circuit invalidated the settlement in part because it found that the "value and utility" of the settlement's injunctive relief—"the ability to surcharge Visa- and MasterCard-branded credit cards"—was "lim-

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provide further proof that the Second Circuit failed to properly safeguard the petitioners' First Amendment rights, and this Court can say so along the way to deciding the question presented.

ited" by the existence of no-surcharge laws in major states like "New York, California, and Texas." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, — F.3d —, 2016 WL 3563719, at *2–*3 (2d Cir. June 30, 2016). That fact hardly reduces the "practical import of state surcharge laws." BIO 13. If anything, it does the opposite. It shows that the issue is so important that ongoing uncertainty over the constitutionality of no-surcharge laws affected the fate of the largest antitrust settlement in history.

3. On the merits, New York defends the Second Circuit's decision by invoking (at 16) the tautological proposition that "price-control laws regulate economic conduct rather than speech." We do not disagree. Price-control laws regulate economic conduct by controlling the amount that merchants may charge for goods or services. But New York's law does not regulate that conduct. It does not control *any* amounts charged by merchants. They are free to set the cash and credit-card prices for any item as they wish. The only thing the law regulates is how those prices are *communicated*—that is, which of the two prices the merchant may frame as the "regular" price on the label, and which the merchant may convey through a separate sign. Put another way, the law does not regulate the "setting [of] prices," BIO 18, but kicks in only *after* they have been set, by demanding one way of framing them over another. Thus, as a New York court long ago explained, a merchant who adopts the state's preferred framing goes "home a free man," but if the same merchant instead truthfully frames the credit-card price as "having been derived from adding a charge to the lower price, he faces the prospect of criminal conviction and possible imprisonment." *People v. Fulvio*, 517 N.Y.S.2d 1008, 1015 (Crim. Ct. N.Y. 1987).

This feature makes New York's law fundamentally different from any of the price-control laws previously

upheld by this Court. *See* BIO 16 (citing cases). Indeed, New York seems to recognize as much, claiming (at 15) that "few if any additional state laws are likely to be affected" by the answer to the question presented. That could only be true if New York's law operated differently than the price-control laws that states have long had on the books. And so this petition does *not* ask the Court to address whether price-control laws must satisfy First Amendment scrutiny. It asks the Court to resolve a split on a fundamental issue concerning whether and to what extent the Constitution limits state-imposed restrictions on the manner by which merchants can frame and convey truthful *pricing information.*

Finally, it is worth mentioning what New York does not say. New York does not contend that the law would satisfy any level of heightened scrutiny. As the district court and the Eleventh Circuit "easily conclude[d]," App. 75a, no-surcharge laws "crumble[] under any level of heightened First Amendment scrutiny," *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1239 (11th Cir. 2015). New York does not attempt to argue otherwise. Nor does it deny that, if the question presented in the three pending petitions is certworthy, this case is the best vehicle for answering it. If the Court agrees that the question presented warrants review, it should therefore grant the petition in this case and hold the other petitions.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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